Supreme Court, U.S.
FILED

021039 DEC 30 2002

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CHRISTOPHER TODD BROWN,
Petitioner,

vs.

CHARLES LI, HENRY YANG, GALEN STUCKEY, DANIEL E. MORSE, FRED LANGE, AND SARAH PRITCHARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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100 pp

QUESTIONS PRESENTED

1. Whether the restrictive First Amendment standard of *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260 (1988), allowing educators broad discretion in regulating the speech of children and adolescents, applies when a state university punishes a graduate student for his speech?

2. Whether the First Amendment is violated when a university denies a graduate student his Master's degree to punish his criticism of university personnel and government officials in the acknowledgment section of his Master's thesis when there is no claim of disruption of university activities and no question that the student fulfilled all requirements for the degree?

PARTIES TO THE PROCEEDING

Petitioner Christopher Todd Brown was the plaintiff in the District Court and appellant in the Court of Appeals for the Ninth Circuit. Defendants were the Dean of the Graduate Division of the University of California Santa Barbara (Charles Li), the Chancellor of the university (Henry Yang), three Professors teaching in science departments of the university (Galen Stucky, Daniel E. Morse and Fred (Lange), and the Director of the university library (Sarah Pritchard).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Todd Brown respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The District Court's unpublished summary judgment in favor of defendants is included in Appendix at 54a. The District Court's Findings of Facts and Conclusions of Law are included in Appendix D at 56a. The Court of Appeals' opinion (per Graber, concurrence by Ferguson, partial concurrence and partial dissent by Reinhardt), is published, as amended, at 308 F.3d 939 (9th Cir. 2002), and is included in Appendix B at 4a. The Court of Appeals' order denying the petition for rehearing and suggestion for rehearing *en banc* is included in Appendix A at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 2002 and amended on October 24, 2002.[1] Petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied on October 1, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(i).

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[1] The amendment was limited to correcting the caption.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech..." U.S. CONST. Amend. I.

STATEMENT OF THE CASE

This Petition raises the issue of whether a state university is entitled to deny a graduate student his Master's degree for one year (and the financial and professional benefits derived therefrom) because petitioner sought to express criticism of university personnel and other government officials related to his graduate school experiences in the acknowledgment section of his Master's thesis. Petitioner's speech in no way disrupted any of the university's functions, nor was it different in style from numerous acknowledgment sections in other graduate theses on file in the university library.[2] The only

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[2] Petitioner filed numerous, representative acknowledgments on file at the university library which demonstrated that acknowledgments were customarily used by graduate students as a forum for wide-ranging, unconstrained extra-curricular speech. ER 184-90, 405-89. References to the "ER" are to the Excerpts of Record in the Court of Appeals. One of these, approved by respondent Stucky, included the following:

> "To: 1) the dips**ts who decided to put the P-chemists on the forth [sic] floor, 2) the inept facilities management monkey who raised the cooling water pressure and 3) the dumb ass who left his cooling water ON for a laser that was OFF for 2 years and subsequently flooded my lab, desk, and my most important files: may your bloated, limb-less bodies wash to shore and be picked clean by seabirds and maggots...Product endorsements: Mark Morey checks the surf exclusively on Netscape 3.0, rides Toobs ™ bodyboards, and is an active member of the Santa

difference is that petitioner's disacknowledgements criticized school officials. Petitioner would not have suffered any adverse action if his disacknowledgements had contained praise of the same school officials. The Ninth Circuit majority employed this Court's deferential standard in *Hazelwood v. Sch. Dist. V. Kuhlmeir*, 484 U.S. 260 (1998), to permit university administrators to engage in this blatant form of viewpoint discrimination.

Petitioner enrolled as a graduate student in the Department of Materials at the University of California Santa Barbara in 1995 and by June 1999 had fulfilled all academic requirements for his Master's degree. This included obtaining approval from petitioner's thesis committee of his Master's thesis, "The Morphology of Calcium Carbonate: Factors Affecting Crystal Growth," which analyzed the crystallizing properties of abalone shells.[3] Professor Stucky, who chaired petitioner's committee, later described petitioner's thesis as "excellent."

On June 11, 1999, petitioner presented his thesis for filing to the Special Collections Department of the university's Davidson Library, as is customary once a thesis is approved. At the beginning of the thesis, petitioner included a section entitled "disacknowledgements," in which petitioner included

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> Barbara and Isla Vista chapters of Surfriders. Wardrobe by ¢rime $pree Loots Suits ™."

ER 190.

[3] University faculty and officials have consistently acknowledged that Petitioner had completed all required courses and assignments for the award of a Master's degree, and admitted that they withheld Petitioner's degree solely on the basis of his refusal to delete his disacknowledegments from the copy of his thesis to be filed in the university library. *See, e.g.*, ER 66, 162.

strong criticisms of certain administrators, as well as former California Governor Pete Wilson.

When a member of the library staff read the "disacknowledgements" petitioner's thesis was not filed, but returned to the Dean of the Graduate Division, defendant Li. Thereafter, petitioner received a letter from the Associate Dean of Students stating that petitioner would not receive his degree unless he removed the disacknowledgements section and apologized to each of the persons mentioned therein. ER 321. The demand that petitioner apologize was later retracted.

Petitioner subsequently sought and obtained a meeting with the Dean of the Graduate Division. The Dean confirmed that petitioner had met all academic requirements for his Master's degree. He nonetheless insisted that the disacknowledgements section of the thesis be removed, characterizing petitioner's criticisms of university personnel as "hate speech."

Petitioner then proffered a revised version of his disacknowledgements, eliminating certain profanity which one of his thesis committee members had told him was objectionable.[4] The revised version still retained the substance of his original criticisms, including (I) expression of frustration with bureaucratic procedures within the graduate division, (2) criticism of the helpfulness of Library staff, (3) criticism of former Governor Pete Wilson's policies that raised tuition and fees fourfold, and (4) criticism of the University Regents for

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[4] In a meeting with petitioner a few days after Professor Stucky became aware of the disacknowledegments, he told petitioner that his principal objection to the disacknowledegments was the use of vulgarity. ER 180-83, 372. Respondent Stucky would not agree to the "unsubstantiated" criticism of a faculty colleague in the disacknowlegments. ER 372-74.

biased and corrupt practices damaging to graduate students.[5]

This version of the disacknowledgements was also rejected by petitioner's thesis committee members and other university officials. One of the thesis committee members refused to consider *any* form of disacknowledgements. Another asserted that no criticism of university personnel was acceptable. The chair of petitioner's committee refused to accept the disacknowledgements because they were "contradictory" to his "personal religious beliefs." ER 212-13, 404–05. At a minimum, the three committee members had three different sets of standards by which they judged the appropriateness of petitioner's disacknowledgements. ER 155-83.

The record clearly indicates that petitioner was denied his degree and punished because he insisted on his right to include such criticism in his acknowledgments and because respondents would not permit such criticism to be included based solely upon content and viewpoint.[6] Had petitioner praised the same administrators he would have been granted his degree and his thesis would have been filed.

Petitioner pursued various appeals to internal university bodies in an attempt to obtain his degree. Each body reiterated that petitioner's Master's degree would be withheld until he removed the disacknowledgements. This continued for nearly a year, during which university officials also placed petitioner on academic probation, making him ineligible for a

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[5] The text of the revised disacknowledegments is included in Appendix E at 64a.

[6] The University's legal counsel suggested that the thesis committee members include a disclaimer indicating that they did not agree with petitioner's disacknowledegments; however, the committee members refused the advice of counsel and would not accept the disacknowledegments in any form. ER 166, 349.

university teaching or research position and fellowship support, as well as preventing him from obtaining employment.

University officials ultimately conferred petitioner's degree several days after they became aware that a national television news report was being prepared for broadcast on the controversy. ER 322.[7] Despite awarding the degree and recognizing the scientific merit of the thesis, university officials still refuse to file petitioner's thesis in the university library. This refusal to file petitioner's thesis deprives others in the scientific community of the benefits of his scholarship and deprives petitioner the recognition in his field such filing would bring.

Petitioner filed suit on June 16, 2000, for damages, declaratory relief and an injunction to compel the university to file petitioner's thesis in the library. After limited discovery, the District Court ruled that respondents were entitled to qualified immunity and granted respondents' summary judgment motion on May 11, 2001. The Court of Appeals affirmed the District Court judgment with respect to petitioner's First and Fourteenth Amendment claims, and remanded the case for consideration of petitioner's state law claims. The Ninth Circuit majority made it clear that none of respondents' actions violated petitioner's First Amendment rights. App. 29a. The majority found no public forum existed and that petitioner's thesis committee had the absolute, essentially unreviewable, authority to impose any standards it chose, including standards based upon viewpoint, in approving thesis acknowledgment sections. App. 27a - 29a.

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[7] Petitioner received notice that his degree was conferred approximately one week after university officials were contacted by ABC personnel regarding the proposed broadcast of a report by Peter Jennings regarding the dispute. ER 245-46, 278.

REASONS FOR GRANTING THE WRIT

This case involves substantial punishment of a graduate student at a state university because he had the temerity to insist on his First Amendment right to include criticism, rather than commonplace praise in the acknowledgment section of his Master's thesis. As the university's own records demonstrated, acknowledgment sections of theses on file in the university library have been an open forum in which students include praise of helpful faculty, thanks to parents and loved ones and a wide range of personal, sometimes oddball, reflections on their school experiences and lives.

The Ninth Circuit majority rejected petitioner's First Amendment claim only by misapplying this Court's deferential standard in *Hazelwood* to the radically different context of graduate student speech.[8] Clearly, petitioner's speech offended the majority in the same manner university administrators were offended. Only by using the *Hazelwood* standard to grant university officials near absolute deference to favor administrative prerogative over freedom of expression, was the majority able to avoid the host of inconvenient facts which would otherwise have entitled

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[8] Judge Graber's explicit adoption of the *Hazelwood* standard must be considered the majority view of the panel and thus the governing standard for university students in the Ninth Circuit. Judge Ferguson's concurrence, though furnishing reasoning different from Judge Graber's, does not challenge Judge Graber's application of the *Hazelwood* standard to student speech in the university context. Indeed, university representatives have publicly described the decision as such. *See* Pam MacLean, "Thanks to My Adviser, May He Rot in Hell -- Free Speech Has its Limits, the 9th Circuit Rules, and One of Them Is the Acknowledgments in a Master's Thesis," S.F. *Daily Journal*, Aug. 13, 2002, in which the University's counsel of record Christopher Patti is quoted: "Graber appears to be writing for a majority, and Ferguson is offering an additional rationale." App. F at 70a.

petitioner to a trial on the merits of his claim that respondents punished him for his adherence to his principles and his right to criticize public officials in this forum.[9]

The Ninth Circuit's approach conflicts with decisions by the First Circuit and Sixth Circuit which explicitly reject the deferential *Hazelwood* standard in the higher education context. Moreover, the First and Sixth Circuit decisions are fully consistent with this Court's acknowledgment in *Hazelwood* itself that such a deferential standard might not be appropriate when applied to the speech of college students. The Ninth Circuit ignored this caution in *Hazelwood* and the reasoning of the First and Sixth Circuits in affirming the right of university administrators to engage in content and viewpoint discrimination by denying petitioner his degree for nearly one year because they disagreed with petitioner's disacknowledgements.

This case provides a timely and appropriate vehicle for this Court to resolve this conflict between the Ninth Circuit and the First and Sixth Circuits and to articulate a First Amendment standard for university level speech recognizing that more mature students on college campuses must be given more freedom to speak than adolescents in high school environment.

The Ninth Circuit's decision also creates nationwide uncertainty about the proper constitutional standard applicable to the speech of college level students. This Court can dispel this uncertainty by announcing a clear rule rejecting the

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[9] Although Judge Ferguson found that petitioner had engaged in some form of academic dishonesty, there was no basis for this conclusion in the record and this was not the basis for the District Court's summary judgment. See App. C at 55a and App. D at 58-63a. The university never charged petitioner with any form of academic dishonesty or with violating any university rules or regulations. The First Amendment issue in this case was clearly presented in the record below.

application of the *Hazelwood* standard in the context of higher education.

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND DECISIONS OF THIS COURT.

A. The Ninth Circuit's Decision Conflicts With Decisions of the First and Sixth Circuits.

The Ninth Circuit's application of the *Hazelwood* standard to college students' free speech conflicts with the decisions of the First and Sixth Circuits. Recognizing that college students should be afforded greater First Amendment protection than elementary and high school students, both the First and Sixth Circuits, unlike the majority in this case, expressly declined to apply the *Hazelwood* standard to college student speech.

In *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*), a university attempted to censor college student speech contained in the school yearbook by withholding its publication. In refusing to apply the *Hazelwood* standard, the Court emphasized that university students are "less impressionable than younger students" and noted that "[t]he danger of chilling...individual thought and expression...is especially real in the university setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Id* at 352 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 n.14, and *Rosenberger*, 515 U.S. at 835-36). [10]

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[10] The Ninth Circuit majority decided that the acknowledgment sections of theses were not even a limited public forum. App. 28a. This reasoning is also at odds with the Sixth Circuit's reasoning in *Kincaid*,

Instead of following *Kincaid*, the Ninth Circuit majority relied heavily on the reasoning of *Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995), a prior Sixth Circuit decision in which a junior high school student alleged that her First Amendment rights were violated when her teacher gave her a failing grade on a paper the topic of which the teacher had previously disapproved.[11] It is therefore particularly significant that the Sixth Circuit *rejected* application of the *Hazelwood* standard when dealing with a college student's speech in *Kincaid*. In *Kincaid*, Kentucky University officials withheld publication of a student yearbook because they objected to some of the content as "inappropriate" and irrelevant to the school's activities. In finding that the university's conduct violated students' free speech rights, the court considered and rejected application of the *Hazelwood* standard, observing "in addition to the nature of the university setting, we find it relevant that the editors of the [yearbook] and its readers are likely to be young adults...Thus, there can be no justification for suppressing the yearbook on grounds that it might be 'unsuitable for immature audiences.'" 236 F.3d at 352.

The court in *Kincaid* then contrasted the *Hazelwood* high school context with the college setting of *Widmar v. Vincent*, 454 U.S. 263 (1981), where this Court observed that "University students are, of course, young adults. They are less impressionable than younger students..." *Id.*, quoting *Widmar* at 274, n.14. The *Kincaid* court ruled that

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236 F.3d at 348-354, and with the evidence of how acknowledgment sections have been used by graduate students at the University of California at Santa Barbara. ER 405-489.

[11] This case does not, like *Settle*, involve disagreement over curriculum or course content. In fact, respondents conceded this in their arguments that Petitioner's disacknowledegments were "irrelevant to the scientific content of the thesis."

withholding of the yearbook's distribution as an unconstitutional suppression of student expression, and concluded "We will not sanction a reading of the First Amendment that permits government officials to censor expression...in order to coerce speech that pleases the government." *Id.*, at 355.

The First Circuit has also rejected the application of the *Hazelwood* standard to college student speech in *Student Govt. Ass'n v. Board of Trustees of the Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989). There, students alleged that university officials had abolished a legal services organization, staffed by attorneys and students, in order to impede students from bringing claims against the university. Addressing the issue whether the students' First Amendment rights were violated, the First Circuit expressly disavowed use of the *Hazelwood* standard as inapplicable in the college context. *Id.*

The Ninth Circuit majority attempts to distinguish the First and Sixth Circuit decisions by characterizing the student speech in yearbooks and newspapers as "extracurricular speech" that is entitled to broader First Amendment protection than "curricular" speech.[12] The purported distinction between curricular and extracurricular speech cannot be reconciled with this Court's ruling in *Hazelwood,* which specifically rejected the contention that the high school paper at issue was

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[12] The Ninth Circuit majority characterizes acknowledgment sections as "curricular" speech, likening it to an assignment to write a paper from a particular viewpoint, "...a law-school professor may assign students to write 'opinions' showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question." App. 28a. In this case, Petitioner wrote what was acknowledged to be an "excellent" thesis, and appended to it personal opinions critical of university officials in a section of his thesis customarily used by students to express personal opinions and viewpoints. He was not given an assignment to write his thesis from a particular viewpoint as part of a class exercise.

"extra-curricular" speech subject to different First Amendment scrutiny than "curricular" speech. *Hazelwood*, 484 U.S. at 271.[13]

Nor is a "curricular/extra-curricular" distinction supported by the First and Sixth Circuit cases, which the Ninth Circuit majority acknowledges refused to apply the *Hazelwood* standard to college student speech. App. 21a. The Sixth Circuit decision in *Kincaid* involved school-related student speech (the school yearbook) very similar to the speech at issue in *Hazelwood* (the school newspaper). Indeed, the *Kincaid* Court presumed that the nature of the speech was the same as that in *Hazelwood*. The Sixth Circuit nonetheless ruled that greater First Amendment protection should be accorded college students than high school students, based upon their greater maturity.

The Ninth Circuit majority's attempt to distinguish the Sixth and First Circuit decisions based upon the "curricular" or "extra-curricular" nature of the speech is without basis in those decisions or in the decisions of this Court. The suggestion that different First Amendment standards apply to speech within the purview or control of an educational institution, based upon characterization of the speech as "curricular" or "extra-curricular" is specious.

The Ninth Circuit majority's reliance on this Court's ruling in *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 122 S. Ct. 2559 (2002), is even more misplaced: in a case concerning drug testing for middle and high school students,

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[13] Such a distinction was also rejected by the Ninth Circuit in *Planned Parenthood of Southern Nevada, Inc. v. Clark City Sch. Dist.*, 941 F.2d 817, 827 (9th Circ. 1991) (*en banc*), where the court in evaluating *Hazelwood* concluded that the Supreme Court "intended that the same principles that animate educational decisions ... come into play when determining what advertisements are suitable for publication in school newspapers, yearbooks and athletic programs."

this Court balanced the Fourth Amendment rights of "children, who...have been committed to the temporary custody of the State as schoolmaster" against the school's "responsibilities as guardian and tutor of children entrusted to its care". *Id* at 2565. Reliance on *Earls* for the First Amendment standards to be applied to a *college* student's *speech* (i.e., whether the speech is "curricular" versus "extracurricular") is without support.

Application of the deferential *Hazelwood* standard to the freedom of expression of college students is in clear conflict with the opinions of the First and Sixth Circuits.[14] This Court should resolve this conflict.

B. The Decision Below Is at Odds With This Court's Decisions Recognizing the Broader First Amendment Rights of Post-Secondary School Students.

The Ninth Circuit's reasoning is also inconsistent with this Court's decisions, including the *Hazelwood* decision.

In *Hazelwood* this Court concluded that a high school principal had acted reasonably in addressing student expression directed to adolescent readers when he refused to allow the school newspaper to publish two articles, one dealing with teenage pregnancy and the other discussing the impact of divorce on students at the school. This Court began its analysis with the recognition that the rights of public school students are not automatically coextensive with the rights of adults, and acknowledged that "a school must be able to take into account the emotional maturity of the intended audience

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[14] Indeed, even under the most deferential First Amendment standards petitioner was entitled to a trial on his claim that respondents had punished him because of the viewpoints expressed in his disacknowledgements.

in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." 484 U.S. at 272.

This Court went on to say that the *Hazelwood* standard was consistent with this Court's view that "the education of the Nation's *youth* is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Id.* at 273 (emphasis added). This Court then expressly acknowledged that such a deferential standard might not be appropriately applied to the speech of college students. *Id.* at 273, n. 7.

This Court specifically observed that the circumstances of publication of the school paper were such that the principal reasonably believed that there was no time to consider revising the articles, and that his only choice was to delete the articles altogether. *Id* at 276. This is in sharp contrast to this case, where university officials refused to consider *any* modifications to petitioner's disacknowledgements during a full year in which they withheld his degree and prevented him from obtaining employment within or outside the university. Respondents had ample time to fulfill their constitutional responsibilities; they adamantly refused to do so.

In *Papish v. Board of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973), petitioner was a graduate student who was expelled for distributing on campus a newspaper containing an article entitled "M-----f----- Acquitted." The university's Dean of Students characterized the article as "indecent speech," and "improper on the university campus." A Student Conduct Committee ruled that petitioner had violated the university's General Standards of Student Conduct, which required students "to conduct themselves in a manner compatible with the university's functions and missions as an educational institution" and "to observe

generally accepted standards of conduct" including refraining from "indecent conduct or speech." This Court ruled that university policy could not be used in order to "proscribe this form of expression," and held that petitioner's expulsion violated her First Amendment rights. *Id* at 671.

As in *Papish*, petitioner was an adult graduate student, speaking to adult readers. The university's censorship of petitioner's speech had nothing to do with fulfillment of his academic course work or the quality of his scholarship; it was patently an effort to prevent petitioner from expressing criticism of the university institution and its governors.[15] Respondents simply did not like the views petitioner expressed and they exercised unrestrained power to censor him.

This Court has, on numerous occasions, considered the "delicate issues concerning the academic community," in which "the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process" must be balanced against "the equally significant interest in the widest latitude for free expression and debate...."*Healy v. James*, 408 U.S. 169, 173 (1972).

In doing so, this Court has also long recognized the unique role of institutions of higher learning as "vital centers of the Nation's intellectual life," *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 835 (1995), and stressed that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'", where academic freedom must be safeguarded. *Id* at 836.

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[15] *See Settle*, 53 F.3d at 155. While the court acknowledged that judicial restraint was appropriate "in classroom conflicts between student and teacher over matters falling within the ordinary authority of the teacher over curriculum and course content," the court also stated emphatically that "teachers should not punish or reward people on the basis of inadmissible factors—race, religion, gender, political ideology...". *Id.*

This Court's opinions have consistently observed that an essential component of academic freedom is the right "to participate in the intellectual give and take of campus debate..." *Widmar v. Vincent*, 454 U.S. 263, 268 (1981), *quoting Healy*, 408 U.S. at 181-182, including debate regarding the performance of the academic institution, its educators and administrators. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969).

The standards this Court has fashioned to govern freedom of expression in high schools should not be applied to this nation's universities. The University of California has asserted in this case the broadest possible claims that university officials may engage in viewpoint discrimination in restricting graduate student speech. These claims have now been embraced by the Ninth Circuit. This Court should draw a clear line between high school and higher education in the application of the *Hazelwood* standard. This case is an appropriate and timely vehicle for doing so.

II. THE UNCERTAIN SCOPE OF FIRST AMENDMENT PROTECTION FOR THE SPEECH OF UNIVERSITY STUDENTS CREATED BY THE NINTH CIRCUIT DECISION IS AN ISSUE OF NATIONAL IMPORTANCE JUSTIFYING REVIEW.

California operates the largest higher education system in the nation. The University of California system alone has nearly 200,000 students, of which nearly 40,000 are graduate students.[16] The California State University and California Community Colleges are home to an additional two million students.[17] The reputation for academic rigor and excellence of the University of California system is known to the students of those California colleges and universities, as well as to the students of institutions of higher learning nationwide.[18]

The decision below diminishes the free speech rights of millions of university students in California alone to the rights held by high school students.

The Ninth Circuit majority employed *Hazelwood* to permit university administrators to engage in viewpoint discrimination at odds with fundamental tenets of this Court's

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[16] These statistics may be found on the University of California website. *See http://www.universityofcalifornia.edu/campuses/welcome.html* and *http://universityofcalifornia.edu/academics/campusprograms.html.*

[17] According to the California Post Secondary Education Commission, there are over 2.5 million post-secondary students in California. Of them, approximately 2.3 million attend schools in the California state system.

[18] Nine of the ten campuses of the University of California system are ranked in the top 100 public schools offering an undergraduate liberal arts program. "Top 100 Values in Public Colleges," The Kiplinger Washington Editors, Inc., at Kiplinger.com, Dec. 02, 2002.

First Amendment jurisprudence. *United States v. Eichman*, 496 U.S. 310, 319 (1990), *quoting Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") Such a free speech regime will inspire self-censorship and political correctness and will undermine the unique role of our institutions of higher learning as "vital centers of the nation's intellectual life." *Rosenberger*, 515 U.S. at 835.

Indeed, students at state institutions of higher learning throughout the nation may now rightfully consider successful academic performance to be measured by their ability to mimic, without criticism, the tastes, views, attitudes and beliefs of their professors. They may now justifiably fear academic reprisals, with career-jeopardizing ramifications, simply for expressing views critical of the quality and performance of those institutions or the educators who operate them. In short, the decision threatens to create a non-critical environment in the very place where rigorous thought, and its expression, should be encouraged.

This Court should adopt a clear, national standard by which these, and all of the Nation's public university personnel and students, can govern their conduct. That standard should not be the paternalistic standard adopted by the Ninth Circuit in this case; it should be a standard befitting the need for freedom of speech to flourish in the university setting.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Dated: December 30, 2002

Respectfully submitted,

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